IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 24, 2006

STATE OF TENNESSEE v. ALLEN RAY KENNEDY

Direct Appeal from the Circuit Court for Lincoln County
No. S0500182 Robert Crigler, Judge

No. M2006-00847-CCA-R3-CD - Filed March 23, 2007

The appellant, Allen Ray Kennedy, pled guilty in the Lincoln County Circuit Court to three counts of aggravated assault, attempted aggravated kidnapping, attempted carjacking, carjacking, reckless endangerment, carrying a handgun with the intent to go armed, and driving on a revoked license. The trial court imposed a total effective sentence of eighteen years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the imposition of consecutive sentencing. Upon review of the record and the parties' briefs, we conclude that due to the trial court's errors in sentencing and its failure to make the requisite findings of fact with regard to consecutive sentencing, the case should be remanded to the trial court for a new sentencing hearing and for correction of the judgment of conviction for driving on a revoked licence.

Tenn. R. App. P. 3 Appeal as of Right; Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Donna Hargrove (at trial) and Andrew Jackson Dearing, III (at trial and on appeal), Shelbyville, Tennessee, for the appellant, Allen Ray Kennedy.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; W. Michael McCown, District Attorney General; and Ann L. Filer and Melissa Thomas, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Based upon the events of April 18, 2005, the Lincoln County Grand Jury returned a multi-count indictment charging the appellant with the aggravated assault of Patsy Freeman, the aggravated assault of Butch Craddock, the aggravated assault of Joseph Hamilton, one count of the attempted

aggravated kidnapping of Patsy Freeman, one count of attempted carjacking involving Patsy Freeman, one count of carjacking involving Joseph Hamilton, one count of reckless endangerment, one count of carrying a handgun with the intent to go armed, and one count of driving on a revoked license.

Thereafter, the appellant pled guilty to the charged offenses. At the plea hearing, the State recited the following factual basis for the pleas:

> [O]n April 18, 2005 here in Lincoln County, Tennessee officers were dispatched to the Wal-Mart Super Center here in Fayetteville about an attempted kidnapping.
>
> One of the people there, a Ms. Patsy Freeman stated that an unknown white male forced her into her vehicle as she was getting into the driver's door and had threatened her with a knife.
>
> Ms. Freeman screamed and yelled and tried to keep the keys to the car to herself and away from this man. Two men who were in the parking lot, Adam Towry and Butch Craddock ran over and tried to help Ms. Freeman. When they got there the white male pointed a gun at Mr. Craddock when he opened the door, and then Mr. Craddock and Mr. Towry and Ms. Freeman all ran away from the car.
>
> The [appellant] then got out of Ms. Freeman's vehicle and ran north to the Oak River Shopping Center parking lot where he took Joseph Hamilton's vehicle by pointing a gun at Mr. Hamilton and telling him to give him his keys and not be a hero.
>
> Shortly after he had stolen this car from Mr. Hamilton, he was spotted by Trooper Will Spivy on Thornton Taylor Highway here in Fayetteville, Lincoln County, Tennessee. The officer tried to stop him.
>
> There was a car chase for some period of time where the public was endangered.
>
> At the conclusion of the chase, the [appellant], Mr. Kennedy, gave himself up to the officers.
>
> [The appellant] was identified by a show-up by all of the people that were victims in this case shortly afterwards. [The appellant] also gave verbal and written confessions to the crime. . . .

> His written confession says: I came to Fayetteville Wal-Mart to steal a car. After walking the sidewalk and the parking lot for hours, I approached a lady getting into her car and pushed her into the passenger seat. I had a knife out and dropped it in her car. A man came up to the passenger side and opened the door. I pulled the pistol and pointed it at him. He and the lady ran across the parking lot. I got out of the car and ran across a field to the next strip mall.
>
> I saw a man putting on boots in his car and approached him. I pointed a gun at him and stole his car. . . . I left and was stopped by the sheriff's patrol after a short chase.
>
> There were also a couple of knives and several firearms taken from [the appellant] at the time of his arrest.

The plea agreement did not include a sentencing recommendation. At the sentencing hearing, the parties relied upon the facts adduced at the plea hearing and the information in the presentence report. The presentence report reflected that the forty-nine-year-old appellant had a history of misdemeanor convictions including carrying a concealed weapon, public place harassment, assault, and three convictions for driving under the influence.

The trial court sentenced the appellant as a Range I standard offender to eleven years for the carjacking conviction; three years each for the aggravated assault convictions, the attempt to commit aggravated kidnapping conviction, and the attempted carjacking conviction; one year for the reckless endangerment conviction; and eleven months and twenty-nine days each for the carrying a handgun with the intent to go armed conviction and the driving on a revoked license conviction. Concluding that the appellant was a dangerous offender, the trial court ordered the three-year sentences for the aggravated assault, attempted aggravated kidnapping, and attempted carjacking involving Freeman to be served consecutively to the three-year sentence for the aggravated assault involving Craddock. Additionally, the court ordered that the aggravated assault conviction involving Hamilton be served concurrently with the eleven-year carjacking conviction involving Hamilton. The court mandated that the eleven-year Hamilton sentences run consecutively to the aggravated assault sentences concerning Freeman and Craddock. Finally, the court ordered that the one year reckless endangerment sentence be served consecutively to the Hamilton, Freeman, and Craddock sentences, for a total effective sentence of eighteen years.

II. Analysis

As his sole issue on appeal, the appellant contends that the trial court erred in imposing consecutive sentencing.[1] Appellate review of the length, range or manner of service of a sentence

[1] We note that at trial, the appellant argued that "no more than two of these [sentences] should be run

(continued...)

is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Initially, our de novo review reveals that the sentencing hearing is replete with errors in the application of enhancement factors, the failure to apply mitigating factors, and the lack of findings regarding consecutive sentencing.[2] Specifically, we note that the trial court did not specify which enhancement factors applied to each offense. Our supreme court has explained "In determining whether a particular enhancement factor may be applied in a specific case, the trial court must consider the elements of the offense and the evidence adduced at the trial and sentencing hearing." State v. Lavender, 967 S.W.2d 803, 807 (Tenn. 1998). Therefore, we will review the trial court's findings de novo without a presumption of correctness. State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994).

The transcript of the sentencing hearing reflects that the trial court first considered whether there were any applicable mitigating factors, finding that none applied. Next, the trial court observed that the appellant had a prior criminal history, warranting the application of enhancement factor (1). Tenn. Code Ann. § 40-35-114(1) (Supp. 2005). The trial court next found that

> enhancing factor number 6 applies given the seriousness of this offense.
>
> That involves personal injuries inflicted upon or amount of damage to property sustained by or taken from the victim was particularly great.

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[1](...continued)
consecutive."

[2] We are perplexed by the appellant's failure to raise the trial court's application of enhancement factors and mitigating factors on appeal. At the sentencing hearing, the appellant argued correctly regarding the application of several enhancing and mitigating factors.

> There is more than one way to injure someone and I do feel like the circumstances of this offense have injured these victims.

See id. at (6). The trial court found the existence of enhancement factor (9), the appellant employed or used a firearm during the commission of the offense, stating that "there is more than one way to commit those offenses. . . . I don't find the use of a firearm is necessarily required for those offenses." See id. at (9). Finally, the court said, "Obviously number 10 applies. Enhancing factor number 10. The [appellant] had no hesitation about committing a crime when the risk to human life was high." See id. at (10). We will address these factors in turn.

The trial court correctly applied enhancement factor (1), that the appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1). The appellant's presentence report reflects that the appellant had convictions for carrying a concealed weapon, public peace harassment, and assault, as well as four convictions for driving under the influence, two of which occurred in Oregon. Enhancement factor (1) is applicable to all of the convictions in the instant case.

Next, the trial court found the existence of enhancement factor (6), "[t]he personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great." Tenn. Code Ann. § 40-35-114(6). There is no proof in the record to support the application of this enhancement factor to the appellant's convictions for reckless endangerment, carrying a handgun with the intent to go armed, or driving on a revoked licence. Further, there is no proof in the record that the victims suffered a great loss of property, aside from the temporary loss of Hamilton's vehicle. However, that loss is inherent in the offense of carjacking. Our supreme court has cautioned, "If the facts which establish the elements of the offense charged also establish the enhancement factor, then the enhancement factor may not be used to increase punishment." Lavender, 967 S.W.2d at 807. Therefore, factor (6) cannot be used to enhance the appellant's conviction for carjacking.

Moreover, the record does not demonstrate that any of the victims of the appellant's crimes suffered any physical injuries. Thus, the trial court erred in finding enhancement factor (6) applicable to all convictions. However, this court has previously concluded that "personal injuries" encompasses emotional injuries as well as physical injuries. State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995). For example, this enhancement factor has been applied when a victim "suffered depression, anxiety, and other emotional problems . . . however, the record must indicate that [the victim's] psychological injuries were particularly great before factor (6) can be applied." Id. In the instant case, Freeman's victim impact statement reflects that since the incident, she is afraid to go shopping alone. She explained that she is divorced, her children live away from home, and she has "lost some of [her] independence." We conclude that enhancement factor (6) is applicable to the offenses involving Freeman, namely aggravated assault, attempted aggravated kidnapping, and attempted carjacking. See State v. Jerry Bell, No. W2004-01355-CCA-R3-CD, 2005 WL 2205849, at *7 (Tenn. Crim. App. at Jackson, Sept. 12, 2005).

The trial court also found the existence of enhancement factor (9), that "[t]he [appellant] possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense." Generally, if an enhancement factor is an essential element of the offense, the factor may not be used to enhance the sentence. See Tenn. Code Ann. § 40-35-114. The appellant's indictment for the attempted aggravated kidnapping of Freeman alleges that the offense was committed "to facilitate the commission of a felony, to-wit: Carjacking." In the indictments charging the appellant with the aggravated assault and attempted carjacking of Freeman, the State alleged that the appellant committed the offenses "by use of a deadly weapon, to-wit: a knife." The indictments charging the appellant with the aggravated assault of Craddock and the aggravated assault and carjacking of Hamilton, allege that the appellant committed the offenses "by use of a deadly weapon, to-wit: a handgun." Ergo, all of the foregoing offenses include as an element that the appellant was armed with a deadly weapon. Additionally, the appellant's conviction for carrying a handgun with the intent to go armed inherently includes the appellant's use of a handgun. Further, there was no proof in the record that the appellant committed the reckless endangerment offense or the driving on a revoked licence offense with the use of a handgun. Accordingly, this enhancement factor may not be used to enhance any of the appellant's sentences.

Finally, the trial court applied enhancement factor (10), finding that the appellant "had no hesitation about committing a crime when the risk to human life was high." This court has previously concluded that "there is necessarily a high risk to human life and the great potential for bodily injury whenever a deadly weapon is used." State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995). Thus, the high risk to human life is inherent in the offenses of aggravated assault, attempted aggravated kidnapping, attempted carjacking, and carjacking. See State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994); State v. Kern, 909 S.W.2d 5, 7 (Tenn. Crim. App. 1993); State v. Michael Lebron Taylor, No. 03C01-9810-CR-00366, 1999 WL 692579, at *7 (Tenn. Crim. App. at Knoxville, Sept. 8, 1999). Moreover, a high risk to human life is inherent the offense of reckless endangerment. See State v. Quinton Cage, No. 01C01-9605-CC-00179, 1999 WL 30595, at *13 (Tenn. Crim. App. at Nashville, Jan. 26, 1999). There is no proof in the record to indicate that enhancement factor (10) is applicable to the appellant's convictions for carrying a handgun with the intent to go armed or driving on a revoked licence. Therefore, the trial court should not have applied this enhancement factor to any of the appellant's convictions.

Next, the trial court refused to mitigate the appellant's sentence because of the appellant's remorse. At the sentencing hearing, the appellant argued that the trial court should consider his remorse as a mitigating factor under Tennessee Code Annotated section 40-35-113(13) (2003). The trial court stated:

> It does appear in the report that the [appellant] has repeatedly said he is sorry.
>
> The Court's response to that is that is an appropriate response. It may be that many defendants are not remorseful. But it is what a defendant should be. And I do not feel that the [appellant] should get

> the benefit of a mitigating factor for doing what – feeling like he should feel under these circumstances.

Thus, it appears that the trial court believed the appellant was truly remorseful; it simply did not want to give the appellant the benefit of that remorse. However, "genuine, sincere remorse is a proper mitigating factor." State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995).

Additionally, at the sentencing hearing the appellant asked that his military record be considered as a possible mitigating factor. Although not acknowledged by the trial court, the presentence report reflects that the appellant

> was in the U.S. Army from June 1975 to May of 1983. He states he attained the rank of staff sergeant and received a honorable discharge (x) 2. The [appellant] states he attained Ranger status and received a Bronze Star "V" and a Purple Heart from a low level night combat jump during the war in Granada.

This court has previously found that an honorable military record is an acceptable mitigating factor under Tennessee Code Annotated section 40-35-113(13). See State v. Chad Michael Knight, No. M2005-00779-CCA-R3-CD, 2006 WL 1491573, at *3 (Tenn. Crim. App. at Nashville, May 31, 2006); State v. Jeffery Brian Parks, No. M2003-02002-CCA-R3-CD, 2004 WL 1936404, at *6 (Tenn. Crim. App. at Nashville, Aug. 30, 2004).

Turning to the specific issue raised by the appellant, we observe that "[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) (2003) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). In the instant case, regarding consecutive sentencing, the trial court stated:

> For the record, I am running those consecutive upon a finding that the [appellant] is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life was high under TCA 40-35-115.

Our case law clearly reflects that in order to find that a defendant is a dangerous offender, a court must also find that "(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) 'the terms are reasonably related to the severity of the offenses.'" State v. Moore, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting Wilkerson, 905 S.W.2d at 938); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999).

The trial court summarily imposed consecutive sentencing due to the appellant being a dangerous offender. The court did not explain its finding nor did it make the requisite Wilkerson findings that the sentences are necessary in order to protect the public from the appellant's further misconduct and the terms are reasonably related to the severity of the offenses. Wilkerson, 905 S.W.2d at 938. Accordingly, we conclude that in light of the foregoing errors and the lack of Wilkerson findings, this case must be remanded to the trial court for a new sentencing hearing.

Additionally, we note that both the transcript of the guilty plea proceedings and the plea agreement reflect that the appellant pled guilty to driving on a revoked license, a Class B misdemeanor, punishable by a maximum sentence of six months. The trial court made no mention of this offense during the sentencing hearing. However, the judgment of conviction for this offense reflects that the appellant was convicted of driving on a revoked licence, a Class A misdemeanor, and he was sentenced to eleven months and twenty-nine days. Therefore, the judgment of conviction and sentence should be corrected to reflect a conviction for a Class B misdemeanor.

III. Conclusion

Based upon the foregoing, we remand to the trial court for a new sentencing hearing and for correction of the judgment of conviction for driving on a revoked licence.

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NORMA McGEE OGLE, JUDGE